Yap Sing Hock & Anor v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 06–7–90
ABDUL HAMID OMAR LP, PEH SWEE CHIN SCJ AND ANUAR J
3 AUGUST 1992

Companies and Corporations *— Separate legal entity — Application of principle to criminal cases*

Criminal Law *— Criminal breach of trust — Charges brought against directors of company — Appellants appointed directors without lodgement of requisite statutory declarations under Companies Act 1965 — Whether appellants were directors of company in law — Whether definition of director in Companies Act 1965 applied to criminal charges — Companies Act 1965 ss 4(1) & 123(4) — Penal Code (FMS Cap 45) s 409*

The appellants were directors of Yap Sing Hock Holdings Sdn Bhd ('Holdings Co') and the first appellant was the beneficial owner of all the shares in Holdings Co. Another company, Lien Hoe Sawmill Co Sdn Bhd ('Lien Hoe') was owned by two groups of shareholders who had all decided to sell all their shares to Holdings Co. In order to complete the sale, a loan was obtained from banks, including Perwira Habib Bank, and $32m was paid to the two groups of shareholders, leaving a balance of $6m to be paid by 30 April 1985, the date for completion. On 30 April 1985, it was agreed at a meeting that Hongkong Bank would lend $12m to Lien Hoe on an application by the appellants as new directors of Lien Hoe to be secured by three fixed deposits. Three fixed deposit receipts totalling $12m issued by Hongkong Bank being Lien Hoe's money of the same amount placed with the bank were brought by the vendors of the shares in Lien Hoe to the meeting. The appellants at the same time were appointed as new directors of Lien Hoe but no statutory declarations were made and lodged by the appellants on 30 April 1985 as required by s 123(4) of the Companies Act 1965 ('the Act'). As new directors, Lien Hoe lent the $12m to Holdings Co out of which the appellants as directors of Holdings Co settled the balance of $6m due to the shareholders of Lien Hoe. Subsequently Perwira Habib Bank placed Lien Hoe under receivership and receivers and managers were appointed. As a result of an examination of the books of Lien Hoe, a report was lodged to the police which led to charges being laid against the appellants, including: the first and second charges which involved the offence of criminal breach of trust allegedly committed by the appellants as directors of Lien Hoe and Holdings Co respectively with regard to the sums of $12m and $2,500,751 respectively. The appellants were also charged, as directors of Lien Hoe, with providing financial assistance to Holdings Co for the purchase of shares in Lien Hoe, an offence punishable under s 67(3) of the Act. The appellants were convicted on the charges and sentenced by the sessions court and their sentences were upheld by the High Court (see [1991] 2 MLJ 334). The appellants thereupon applied for four questions of law to be referred to the Supreme Court, the first and fourth of which were dealt with by the court. The first question is whether a person can be held or deemed to be a director of a private limited company by the definition of 'director' under s 4 of the Act and the fourth question is whether a director/member of a private limited company can be said to have committed an offence under s 409 of the Penal Code (FMS Cap 45) by paying out money from the said company's fund to a third party when he is the sole contributor of the paid-up capital and ultimately, the sole beneficial owner of all the issued shares of the said company. It was submitted for the defence that as no statutory declarations under s 123(4) were made and lodged by both appellants, the prosecution had failed to prove that they were directors of Lien Hoe as stated in the first and third charges. The prosecution, however, submitted that both appellants were in law directors of Lien Hoe because s 4 of the Act defined a director as including a non-director who was in the position of a director by whatever name he was called. The appellants, it was argued, had put on the mantle as directors of Lien Hoe by instructing that the cheque for the transfer of the $12m from Lien Hoe to Holdings Co be prepared. The prosecution also argued that on the same evidence the appellants were agents of Lien Hoe as stated in the charges.

Held, answering the first question in the negative and quashing the convictions on the first and second charges:

(1) The definition of 'director' in s 4 of the Act cannot be applied to the charges preferred under the Penal Cap (FMS Cap 45) and any other law (except under the Companies Act 1965 itself) which has to be strictly construed in favour of liberty. The answer to the first question, on a criminal charge under the Penal Code (FMS Cap 45), is in the negative. As such the second and third questions would not arise.

(2) The charges against the appellants as framed under s 409 of the Penal Code (FMS Cap 45) have not adhered strictly to the wording of s 409. The prosecution has not at any stage suggested an amendment in any way and in the circumstances the court does not propose to amend the first charge. The court would not apply s 422 of the Criminal Procedure Code (FMS Cap 6) in respect of the irregularity in the first charge which involved a breach of the fundamental principle that the prosecution has to prove every ingredient of the offence or charge beyond a reasonable doubt. The conviction under the first charge cannot stand.

(3) The primary principle of distinction and separateness of a corporation as a legal entity from its members and shareholders applies inviolably in cases in which a company is a victim of fraud or wrongful deprivation and in criminal offences against the property of the company. The fourth question cannot be answered in the 'negative' or 'affirmative' as its wording is wide of the mark and ambiguous. The question as posed can only be answered with

reference to the ingredients of an offence. Accordingly the court declined to answer the question.

(4) Since the second charge referred to the commission of breach of trust against the property of Holdings Co and not Lien Hoe, it would not be appropriate to rely on the allegedly illegal origin or source of the money of Holdings Co so as to stamp the money which was drawn and lent to the first appellant as non-available legally for lending. Such loan or advance in the circumstances was not prohibited by the Act. The conviction under the second charge cannot stand.

(5) The third charge was created under the Act so that strict proof of directorship has been modified by the definition of 'director' under s 4 of the Act. The conviction under the third charge should remain undisturbed.

Per curiam:

(1) The categories of purposes for which the court will lift the corporate veil is never closed.

(2) Intention has acquired a special meaning. A man intends to commit the offence or do the forbidden act as prescribed by law if at or before the time of commission of the offence or the doing of the forbidden act, an accused person has foresight that his conduct will lead to the commission of the offence or the doing of the forbidden act as described or prescribed by law, irrespective of whether he knows it is such an offence or such a forbidden act so described or as prescribed by law and he desires the commission of such an offence or doing of such a forbidden act. Where foresight above-described is present but the desire above-described is absent, then it becomes the mens rea for 'recklessness'.

[Bahasa Malaysia summary

Perayu adalah pengarah Yap Sing Hock Holdings Sdn Bhd ('Syarikat Holdings') dan perayu pertama adalah pemilik benefisial semua syer dalam Syarikat Holdings. Satu syarikat yang lain, Lien Hoe Sawmill Co Sdn Bhd ('Lien Hoe)) dipunyai oleh dua kumpulan pemegang syer yang semuanya telah memutuskan untuk menjual semua syer mereka kepada Syarikat Holdings. Agar menyelesaikan penjualan itu, suatu pinjaman telah diperoleh daripada beberapa bank, termasuk Perwira Habib Bank, dan $32 juta telah dibayar kepada kedua-dua kumpulan pemegang syer itu, meninggalkan baki sebanyak $6 juta untuk dibayar pada 30 April 1985, tarikh untuk penyelesaian. Pada 30 April 1985, telah dipersetujui di suatu mesyuarat bahawa Hongkong Bank akan memberikan pinjaman sebanyak $12 juta kepada Lien Hoe atas suatu permohonan oleh perayu sebagai pengarah baru Lien Hoe yang dikehendaki dijamin oleh tiga deposit tetap. Tiga resit deposit tetap berjumlah $12 juta dikeluarkan oleh Hongkong Bank yang merupakan wang Lien Hoe bagi amaun yang sama yang telah dilaburkan dengan bank itu telah dibawa oleh penjual syer dalam Lien

Hoe ke mesyuarat itu. Perayu pada masa yang sama telah dilantik sebagai pengarah baru Lien Hoe tetapi tiada akuan statutori telah dibuat dan dikemukakan oleh perayu pada 30 April 1985 seperti yang dikehendaki oleh s 123(4) Akta Syarikat 1965 ('Akta itu'). Sebagai pengarah baru, Lien Hoe memberikan pinjaman $12 juta itu kepada Syarikat Holdings daripada mana perayu sebagai pengarah Syarikat Holdings menyelesaikan baki $6 juta yang kena dibayar kepada pemegang syer Lien Hoe. Kemudiannya Perwira Habib Bank meletakkan Lien Hoe di bawah kuasa penerima dan penerima dan pengurus telah dilantik. Akibat suatu pemeriksaan buku Lien Hoe, suatu laporan telah dikemukakan kepada polis yang telah menyebabkan pertuduhan dibuat terhadap perayu, termasuk: pertuduhan yang pertama dan kedua yang melibatkan kesalahan pecah amanah jenayah yang dikatakan telah dilakukan oleh perayu masing-masing sebagai pengarah Lien Hoe dan Syarikat Holdings masing-masing berkenaan jumlah $12 juta dan $2,500,751. Perayu juga telah dituduh, sebagai pengarah Lien Hoe, memberikan pertolongan kewangan kepada Syarikat Holdings untuk pembelian syer dalam Lien Hoe, suatu kesalahan yang boleh dihukum di bawah s 67(3) Akta itu. Perayu telah disabitkan bersalah atas pertuduhan-pertuduhan itu dan dijatuhkan hukuman oleh mahkamah sesyen dan hukuman mereka disahkan oleh Mahkamah tinggi (lihat [1991] 2 MLJ 334). Perayu terus memohon untuk empat soalan undang-undang dirujuk kepada Mahkamah Agung, yang mana soalan pertama dan keempat telah dibicarakan oleh mahkamah. Soalan pertama ialah sama ada seseorang boleh diputuskan atau dianggap sebagai seorang pengarah sebuah syarikat persendirian berhad oleh definisi 'director' di bawah s 4 Akta itu dan soalan keempat ialah sama ada seseorang pengarah/ahli sebuah syarikat persendirian berhad boleh dikatakan telah melakukan suatu kesalahan di bawah s 409 Kanun Keseksaan (FMS Bab 45) dengan membayar wang daripada dana syarikat itu kepada suatu pihak ketiga jika beliau adalah penyumbang tunggal semua syer yang dikeluarkan di syarikat itu. Telah dihujahkan bagi pihak pembela bahawa kerana tiada akuan statutori di bawah s 123(4) telah dibuat dan dikemukakan oleh kedua-dua perayu, pihak pendakwa telah gagal membuktikan bahawa mereka adalah pengarah Lien Hoe seperti yang dinyatakan dalam pertuduhan pertama dan ketiga. Pihak pendakwa, akan tetapi, berhujah bahawa kedua-dua perayu adalah pengarah Lien Hoe dari segi undang-undang kerana s 4 Akta itu mendefinisikan seorang pengarah sebagai termasuk seorang yang bukan pengarah yang ada dalam kedudukan pengarah walau apa pun nama beliau dipanggil. Perayu, ia dihujahkan, telah mengambil tanggungjawab sebagai pengarah Lien Hoe dengan mengarahkan bahawa cek untuk pemindahan $12 juta daripada Lien Hoe kepada Syarikat Holdings disediakan. Pihak pendakwa juga berhujah bahawa atas keterangan yang sama, perayu adalah ejen Lien Hoe seperti yang telah dinyatakan dalam pertuduhan-pertuduhan itu.

Diputuskan, menjawah 'tidak' pada soalan pertama dan membatalkan sabitan atas pertuduhan pertama dan kedua:

(1) Definisi 'director' dalam s 4 Akta itu tidak boleh terpakai kepada pertuduhan-pertuduhan yang dibuat di bawah Kanun Keseksaan (FMS Bab 45) dan undang-undang lain apa pun (kecuali di bawah Akta Syarikat 1956 itu sendiri) yang harus betul-betul ditafsirkan menyebelahi kebebasan. Jawapan kepada soalan pertama, atas suatu pertuduhan jenayah di bawah Kanun Keseksaan (FMS Bab 45), adalah 'tidak'. Oleh itu soalan kedua dan ketiga tidak akan timbul.

(2) Pertuduhan terhadap perayu seperti yang telah dibentuk di bawah s 409 Kanun Keseksaan (FMS Bab 45) tidak betul-betul mematuhi susunan kata s 409. Pihak pendakwa tidak pada sebarang peringkat mencadangkan suatu pemindaan dalam cara apa pun dan dalam keadaan itu mahkamah tidak mencadangkan untuk meminda pertuduhan pertama. Mahkamah tidak akan memakai s 422 Kanun Acara Jenayah (FMS Bab 6) dari segi luar aturan dalam pertuduhan pertama yang melibatkan suatu pelanggaran prinsip asasi bahawa pihak pendakwa harus membukti setiap faktor kesalahan atau pertuduhan melampaui keraguan yang munasabah. Sabitan di bawah pertuduhan pertama tidak boleh berkuat kuasa.

(3) Prinsip utama pembezaan dan keasingan sesebuah syarikat sebagai entiti yang sah di sisi undang-undang daripada ahli-ahli dan pemegang syernya terpakai dengan tidak boleh dicabul dalam kes-kes di mana sebuah syarikat adalah mangsa fraud atau perampasan salah dan dalam kesalahan jenayah terhadap harta syarikat itu. Soalan keempat tidak boleh dijawab 'tidak' atau 'ya' kerana susunan katanya adalah tidak tepat dan kabur maknanya. Soalan seperti yang dikemukakan itu hanya boleh dijawab dengan rujukan kepada faktor-faktor sesuatu kesalahan. Oleh kerana itu mahkamah enggan menjawab soalan itu.

(4) Kerana pertuduhan kedua itu merujuk kepada perbuatan melakukan pecah amanah terhadap harta Syarikat Holdings dan bukan Lien Hoe, ia tidak wajar untuk bertanggung pada asal atau punca wang Syarikat Holdings itu yang dikatakan menyalahi undang-undang supaya mengecap wang yang telah dikeluarkan dan dipinjamkan kepada perayu pertama sebagai tidak sedia ada dari segi undang-undang untuk dipinjamkan. Pinjaman atau bayaran pendahuluan seperti itu dalam keadaan itu tidak dihalang oleh Akta itu. Sabitan di bawah pertuduhan kedua tidak boleh berkuat kuasa.

(5) Pertuduhan ketiga telah dicipta di bawah Akta itu jadi pembuktian sebenarnya pengarahan telah diubah suai oleh definisi 'director' di bawah s 4 Akta itu. Sabitan di bawah pertuduhan ketiga patut tetap tidak diusik.

Per curiam:

(1) Kategori tujuan untuk mana mahkamah akan menyelak tabir korporat tidak pernah tertutup.

(2) Niat telah mendapat suatu erti khas. Seseorang berniat untuk melakukan kesalahan atau melakukan perbuatan yang dilarang

seperti yang ditetapkan oleh undang-undang jika pada atau sebelum masa perbuatan melakukan kesalahan itu atau melakukan perbuatan yang dilarang itu, seseorang yang dituduh berpandangan jauh yang kelakuannya akan menyebabkan perbuatan melakukan kesalahan atau melakukan perbuatan yang dilarang seperti yang diterangkan atau ditetapkan oleh undang-undang, tidak kira sama ada dia tahu ianya adalah kesalahan seperti itu atau melakukan perbuatan yang dilarang seperti yang diterangkan atau ditetapkan oleh undang-undang dan dia berhasrat perbuatan melakukan kesalahan seperti itu atau melakukan perbuatan yang dilarang seperti itu. Di mana terdapat pandangan jauh yang diterangkan di atas tetapi hasrat yang diterangkan di atas tidak ada, jadi ia menjadi mens rea untuk 'sikap tidak peduli'.]

Cases referred to

1 *Dean v Hiesler* [1942] 2 All ER 340 (refd)
2 *Tay Choo Wah v PP* [1976] 2 MLJ 95 (folld)
3 *PP v Yeoh Teck Chye* [1981] 2 MLJ 176 (folld)
4 *Kwan Ping Bong & Anor v R* [1979] AC 609; [1979] 2 WLR 433 (folld)
5 *Salomon v Salomon & Co Ltd* [1897] AC 22 (refd)
6 *Daimler Co Ltd v Continental Tyre and Rubber Co Ltd* [1916] 2 AC 307 (folld)
7 *Jones v Lipman* [1962] 1 All ER 442; [1962] 1 WLR 832 (refd)
8 *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 (refd)
9 *Attorney General's Reference (No 2 of 1982)* [1984] QB 624; [1984] 2 All ER 216; [1984] 2 WLR 447 (folld)
10 *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250; [1979] 1 All ER 118; [1978] 3 WLR 712 (refd)
11 *R v Ralph Roffel* [1984] Aust Crim Rep 135 (not folld)
12 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; [1971] 2 All ER 127; [1971] 2 WLR 1166 (refd)
13 *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146 (refd)

Legislation referred to

Companies Act 1965 ss 67(3), 123(4), 125(1)
Criminal Procedure Code (FMS Cap 6) s 422
Penal Code (FMS Cap 45) s 409

Appeal from: Criminal Appeal Nos 44–1–89 and 44–2–89 (High Court, Johore Bahru)

G Sri Ram (*Arthur Lee Meng Kwang* with him) (*Arthur Lee & Co*) for the first appellant.

Kadir Kassim (*Arthur Lee Meng Kwang* with him) (*Arthur Lee & Co*) for the second appellant.

Ng Aik Guan (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Peh Swee Chin SCJ (delivering the judgment of the court): Four questions of law were earlier allowed to be reserved for determination by this court under s 66 of the Courts of Judicature Act 1964. They are as follows:

1. Whether the definition of 'director' under s 4 of the Companies Act 1965, a person can be held or deemed to be a director of a private limited company?
2. Whether in the non-compliance with s 123(1) and (4) of the Companies Act 1965 a person can be held or deemed to be a director of a private limited company?
3. If the answer to question 2 is in the negative, can a person who is being charged as an agent, or as a director of a private limited company and in that capacity be held to act as an ad-hoc agent by the said company?
4. Whether a director/member of a private limited company can be said to have committed an offence under s 409 of the Penal Code [FMS Cap 45] by paying out moneys from the said company's funds to a third party when he is the sole contributor of the paid-up capital and ultimately, the sole beneficial owner of all the issued shares of the said company?

It would be necessary to set out some material facts whenever it is necessary to do so in this judgment.

Three of the charges against the appellants on which they were convicted and which were connected with the four questions were as follows:

> First charge
>
> That you jointly on 30 April 1985, at the Hongkong and Shanghai Banking Corporation, No 1, Jalan Bukit Timbalan, in the district of Johore Bahru, in the State of Johore, being agents of Lien Hoe Sawmill Sdn Bhd, to wit, directors and in such capacities entrusted with the dominion over certain property, to wit, M$12,000,000, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s 409 of the Penal Code [FMS Cap 45].
>
> Second charge
>
> That you jointly on 10 May 1985, in the district of Johore Bahru, in the State of Johore, being agents of Yap Sing Hock Holdings Sdn Bhd, to wit, directors and in such capacities entrusted with the dominion over certain property, to wit, M$2,500,751, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s 409 of the Penal Code [FMS Cap 45].
>
> Third charge
>
> That you jointly on 30 April 1985, at the Hongkong and Shanghai Banking Corporation, No 1, Jalan Bukit Timbalan, in the district of Johore Bahru, in the State of Johore, being officers of Lien Hoe Sawmill Co Sdn Bhd, to wit, directors did give financial assistance to Yap Sing Hock Holdings Sdn Bhd for the purpose of a purchase of 4,413,284 shares in the former company, and you have thereby committed an offence punishable under s 67(3) of the Companies Act 1965.

The appellants were sentenced by the sessions court and their sentences were upheld by the High Court when their appeals were dismissed. The sentences are three years' imprisonment each on the first and second charges with both sentences to run concurrently; a fine only of $2,500 and in default, three months' imprisonment on the third charge.

Both appellants were already directors of Yap Sing Hock Holdings Sdn Bhd, the company named in the second charge, before the events took place on the dates mentioned in the three charges. Further and significantly, the first appellant was the beneficial owner of all the shares or issued capital of this company (hereinafter called 'Holdings Co') and his co-directors had held all their shares in Holdings Co in trust for the first appellant by deeds of trust, viz exhs D42A and 42B in the sessions court. This fact of Holdings Co being a one-man company owned 100% by the first appellant has also never been disputed.

Another company named in the first and third charges, ie Lien Hoe Sawmill Co Sdn Bhd (hereinafter called 'Lien Hoe'), prior to the dates in the said charges, as regards its issued capital was owned by two groups of shareholders who could be called majority shareholders and minority shareholders respectively.

Differences having arisen between these two groups they all found it expedient to sell all their shares to Holdings Co and for that purpose a series of agreements were entered into for a total price of $46m. It would not be necessary to go into the details of these agreements as these agreements were never in doubt nor their propriety disputed. It was not disputed that the sale by both groups of shareholders was to be transacted simultaneously and control of Lien Hoe was to pass to Holdings Co only on full payment of the purchase price. Both groups of shareholders of Lien Hoe were represented by their respective solicitors all of whom would appear to be perfectly aware of the events either personally or as creditably informed by each other.

After several extensions of time to pay in full the purchase price and therefore to complete the sale, a final deadline was set for 30 April 1985 for the purpose. In April 1985, before 30 April 1985, a loan was obtained from banks, including Perwira Habib Bank, and $32m was paid on 29 April 1985 to the two groups of shareholders who were the vendors, leaving a balance of $6m to be paid by 30 April 1985.

On the crucial day, ie 30 April 1985, the vendors, the appellants and the solicitors for the majority shareholders (viz PW2) were present at the office of the manager of Hongkong Bank. Although the solicitors for the minority shareholders of Lien Hoe was not present, it was not disputed that he was kept informed by PW2, the solicitors for the majority shareholders. The first appellant and PW2 had earlier met the secretary of Lien Hoe and the latter had also come to the meeting at Hongkong Bank with a set of documents comprising resolutions of Lien Hoe relating to the sale. At the meeting, the vendors came also with Lien Hoe's cheque book and three fixed deposit receipts totalling $12m issued by the Hongkong Bank being Lien Hoe's money of the same amount placed with the bank. At the meeting the solicitor for another bank, viz Perwira Habib Bank, which had also lent the money to Holdings Co which was earlier paid to the vendors of the shares of Lien Hoe, was also present.

At the meeting, it was agreed by all parties that the Hongkong Bank would lend $12m to Lien Hoe on an application by the appellants as new directors of Lien Hoe to be secured by the three fixed deposits. The appellants were at the same time or contemporaneously appointed as new directors of Lien Hoe with three previous directors of Lien Hoe resigning as directors. As new directors, Lien Hoe lent the $12m to Holdings Co. A new account in the name of Holdings Co was opened in the Hongkong Bank into which the said $12m was paid. Out of the $12m, the appellants as directors of Holdings Co settled the balance of $6m due to the vendors of the shares in Lien Hoe.

Lien Hoe became thus the wholly-owned subsidiary of Holdings Co; the whole of the issued capital of the latter was, as stated previously, owned by the first appellant.

There was nothing surreptitious about the meeting; all parties present, including the solicitor for Perwira Habib Bank, did not appear to be aware at all whether anything they were doing was wrong, or that the transactions were anything in the nature of wheeling and dealing.

Subsequently, Perwira Habib Bank Bhd, placed Lien Hoe under receivership and appointed Price Waterhouse, chartered accountants, as receivers and managers, and one Encik Ishak bin Hashim, the general manager of Perwira Habib Bank Bhd, was, subsequent to such placement of Lien Hoe under receivership and in order to recover money lent to Lien Hoe, appointed on 16 July 1986 as a director of Lien Hoe to look after such interests of the Perwira Habib Bank. Upon examining the books of Lien Hoe, he lodged a report to the police on 20 October 1986, being report No 19317/86, at Johore Bahru, alleging that the board of directors of Lien Hoe had disregarded the interests of creditors with his belief that offences might have been committed. This report undoubtedly and ultimately led to the charges, including the charges concerned herewith, being laid against the appellants. This would, presumably, seem to run counter to the view of the solicitor for Perwira Habib Bank who did not voice any objection at the crucial meeting on 30 April 1985.

Among the circular resolutions was one dealing with the appointment of the appellants as new directors, viz exh P28 on which both parties set great store and which is set out below:

> Appointment of new directors
>
> Resolved that the following three gentlemen be and are hereby appointed directors of the company subject to their completion of the statutory documents as required under s 123(1) and (4) of the Companies Act 1965:
>
> (a) Dato Yap Sing Hock (I/C 0684644)
> 1–A, Jalan Stulang Darat, Johore Bahru, Johore.
> (b) Yap Seng Chang (I/C 4112475)
> 72–A, Jalan Mahkota, Taman Iskandar, Johore Bahru, Johore.
> (c) Abdul Hamid bin Mohd Tahir (I/C 3735688)
> 21, Jalan K–4, Taman Tampoi Baru, Johore Bahru, Johore.

The learned sessions court judge found that the appellants had become new directors in pursuance thereof but it was the contention of the defence that the said resolution did not create a valid appointment of both appellants as directors, inter alia, because of s 123(4) and s 125(1) of the Companies Act 1965 ('the Act') which are set out below:

> 123(4) Every person shall before he is appointed a director of a company make and lodge with the Registrar and the Official Receiver a statutory declaration in the form prescribed by regulations that he will not be acting in contravention of sections 125 and 130.
>
> 125(1) Every person who being an undischarged bankrupt acts as director of, or directly or indirectly takes part in or is concerned in the management of, any corporation except with the leave of the Court shall be guilty of an offence against this Act.
>
> Penalty: Imprisonment for three years or ten thousand ringgit or both.

It was not and could not be disputed that no such statutory declarations were made and lodged by both the appellants on 30 April 1985 in accordance with the provisions of the sections quoted above. Therefore it was submitted that the prosecution had failed to prove that they were directors of Lien Hoe as stated in the first and third charges on 30 April 1985. This submission was renewed before us by learned counsel for the appellants.

It was submitted by the learned deputy public prosecutor ('DPP') before us that both appellants were in law directors of Lien Hoe because of s 4 of the Act which defined a director as including a non-director who was in the position of a director by whatever name he was called. Section 4 is set out below:

> (1) In this Act, unless the contrary intention appears —
> ... 'director' includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director.

The learned DPP with considerable force renewed the submission that by instructing the cheque (exh P15) to be prepared for transfer of the said $12m in question from Lien Hoe to Holdings Co, the appellants had put on the mantle as directors of Lien Hoe and come within the definition of directors. There was sufficient evidence to prove this. On the same evidence it was submitted that both the appellants were nonetheless agents of Lien Hoe as stated in the charges.

It was submitted for the defence that the stand of the prosecution and the issue as well was that the appellants were directors of Lien Hoe on 30 April 1985 as stated in the first charge. The case of *Dean v Hiesler*[1] was cited again before us. The High Court below referred to the evidence and s 4 of the Act and found little assistance from *Dean v Hiesler*,[1] holding that they were directors for the purpose of the first and third charges.

As we have stated elsewhere, the principle of the duty of the prosecution to prove beyond a reasonable doubt every ingredient of a charge, is a principle too plain to require any authority to support it; it is also a principle of great and fundamental importance at the same time.

Having regard to the wording in the first charge, the question is whether both directors were charged as directors of Lien Hoe. The first charge stated that both appellants: '... being agents of Lien Hoe Sawmill Co Sdn Bhd, to wit, directors and in such capacities entrusted with the dominion etc'.

According to *Shorter Oxford Dictionary* (3rd Ed), the words 'to wit' mean 'namely or that is to say ...'. The meaning therefore would be that they were charged as directors and in that capacity were entrusted with the money in question as agents of Lien Hoe; the words 'to wit' preceding the word 'director' would appear to us to be emphasizing the office of directors held by the appellants through the instrumentality of which they were entrusted as agents with the money in question.

This was the basis on which the case was proceeded with in the lower courts, to which both parties have directed their energies to. No application for amendment of the charge by deleting the words 'to wit, directors' has been made at any time, or any suggestion therefor made.

The definition of 'director' in s 4 of the Act, in our view, cannot be applied to the charges preferred under the Penal Code (FMS Cap 45), and any other law for that matter (except under the Companies Act 1965 itself), which has to be strictly construed in favour of liberty. Whether both appellants were directors or not became a question of fact which the prosecution had to prove beyond a reasonable doubt. The same view was espoused by the Court of King's Bench comprising three judges in *Dean v Hiesler*[1] in which the accused was charged as being a director of a company in connection with certain offences under reg 91 of the Defence (General) Regulations. It was held that reg 91 in question, being a penal enactment, must be construed strictly in favour of the defence and the accused, who had not been duly appointed as director of the company in question, could not be such a director. Similar argument advanced there about the definition of director in the Companies Act 1929 of Britain being extended to a person in the position of a director though not an actual director was rejected. We are in entire agreement with the reasoning behind the rejection of such similar argument. Only for compliance with all the requirements of the Act and the prosecution of offences created by the Act, the definition of 'director' in the Act applies.

Reverting back to the first question reserved to this court for determination, on a criminal charge under the Penal Code (FMS Cap 45), it should be answered in the negative. Such being the case, the second and third questions referred to us would not arise.

Nonetheless we think it desirable to state our view on the third question briefly. Any person, whether a director or not, can be charged as an agent of a company in respect of an offence committed against the company, if such agency can be determined from the evidence adduced, please see *Tay Choo Wah v PP*[2] and *PP v Yeoh Teck Chye.*[3] It follows, that a director, normally regarded ipso facto as an agent of the company, ought not to be charged as agent of the company in respect of an offence committed against the company when he was not involved in the commission of the offence at all; this is of course not with specific reference to the charges against the appellants in this case.

Speaking generally, we wish to make one observation once again. The charges as framed under s 409 of the Penal Code (FMS Cap 45) in this case have not adhered strictly to the wording of s 409 which is set out below:

> Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach

> of trust in respect of that property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

The modifying words 'in his capacity' refer to a public servant and the words 'in the way of his business' refer to 'banker, agent ...'. Decided cases on the phrases do not necessarily apply to both situations provided by the two different phrases for one thing; and it could even lead to serious arguments in court.

It has occurred to us that in regard to the seemingly technical nature of the wording of the first charge in question, whether we should amend it at this stage by deleting the words 'to wit, directors' from the first charge so as to preserve the conviction already upheld by the High Court, as was done in *Yeoh Teck Chye*,[3] but whereas in that case facts justifying such a course of action would not cause any injustice as found and stated in that case the circumstances in this case would not be of such a variety.

In the instant case, it was hotly contested, the case was conducted with the veritable spirit of the adversarial system on the issue whether the appellants were directors on 30 April 1985 and the issue was one all parties have concentrated their energies on and above all, the prosecution has never deemed it fit at any stage to even suggest an amendment in any way, and has throughout the case put forward a legal view of facts on the question such that any court, if so disposed towards an amendment on its own motion, could not do so without being unfair or appearing to be unfair to one of two sides. After all, a court in a criminal case would have, generally speaking, to balance the interests of the prosecution on the one hand against those of the accused on the other. We do not propose to amend the first charge.

It has also occurred to us whether we should apply s 422 of our Criminal Procedure Code (FMS Cap 6) which provides that no order or finding should be reversed or altered on account of, eg any irregularity, etc in the charge, etc, unless such error has occasioned a failure of justice. The error or what looks like an error in the instant case seems to be technical. Whether any court should apply s 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice. It is a fundamental principle in our law that the prosecution has to prove every ingredient of the offence or charge beyond a reasonable doubt. This principle is involved in the irregularity of the first charge here. In saying all this, we have also adopted with great respect, the similar reasoning of Lord Diplock in the Privy Council case of *Kwan Ping Bong & Anor v R*[4] at p 615. We would not apply s 422 of the Criminal Procedure Code (FMS Cap 6).

To sum up at this stage of our judgment, for reasons given, conviction under the first charge cannot stand.

We now deal with the fourth question as set out at the beginning of the judgment and the fourth question has close connection with the third charge. The answer to this question will depend partly on an answer to another question as to whether the principle of distinction and separateness

of a corporation as a legal entity from its members and shareholders as A
established by the leading case of *Salomon v Salomon & Co Ltd*[5] applies inviolably to criminal cases under the Penal Code (FMS Cap 45). If the answer to this question of applicability of the said principle is in the affirmative, then our answer to the fourth question posed may similarly be in the affirmative.

B
Let us now discuss this matter from several aspects in order to search for this rather vexed and elusive answer.

The said principle (hereafter called 'the primary principle') stated above is sometimes referred to as the veil of incorporation and it gives rise to another principle of lifting of the veil of incorporation for certain reasons. Such veil has been lifted by statutes, eg the Companies Act 1965 itself or by C
the courts for certain specified purposes. The lifting of the veil clearly constitutes a violation of the primary principle but this has come to be treated correctly as an exception to the primary principle with such exception being subject to the parameters and perimeters indicated by the statutes or by the specified purposes so far indicated by the courts when lifting the veil. D

It would not be necessary to set out many examples of lifting of the corporate veil by statutes except by just mentioning one, viz the Act requires group accounts for both holding and subsidiary companies, thus throwing light on the relationship between a holding company and its subsidiaries. E

When the court lifts the veil, from the decided cases, it does so to do justice limited to a few purposes some of which are set out below. First, it is for the purpose of tax cases in order to ascertain tax liability or for detecting tax evasion. The law reports are full of these cases. Secondly, it is for the purpose of detecting any trading with the enemy. Please see *Daimler Co Ltd v Continental Tyre and Rubber Co Ltd.*[6] Thirdly, it is for some illegal F
or improper purpose directed against a third party, eg where a vendor of land in *Jones v Lipman*[7] in breach of the contract for sale of land tried to avoid an action for specific performance of contract regarding the land by transferring the land to a company which he had formed. There are a great number of cases involving some other illegal or improper purposes. Fourthly, G
where facts are such that the court lifts the veil on account of equitable considerations, please see, eg *Ebrahimi v Westbourne Galleries Ltd & Ors.*[8]

The categories of purposes for which the court will lift the veil is never closed. A court has always the discretion to have a crack at it to do justice.

It will be argued that to do justice will involve doing justice to an accused person whose liberty is imperilled and whose innocence is presumed until H
proven guilty. However, the legal position is far more intricate than this simple argument suggests.

All the cases for which the courts have lifted the veil to do justice seem to be civil cases or due to illegal and improper purposes directed against third parties or outsiders to the companies in question who have or would I
have suffered damage but for the lifting of such veil. In each of those cases, it would seem that the company in question has been used as an engine of fraud or wrongful deprivation, etc. In our instant case, both appellants

A cannot be in the shoes of such persons and they were charged in a criminal case for offences against the property of the company in question. The lifting of the veil in such criminal cases will not be supported by the decided cases but it will be patently irrational if one considers the real reason for lifting the corporate veil.

B Yet another reason is that if the primary principle were not to apply to criminal cases under the Penal Code (FMS Cap 45), it would mean that the primary principle would be replaced by a good deal of awesome uncertainties of great magnitude; awesome because of the tremendous number of limited liability companies nowadays playing such a predominant role in the commercial life of any country.

C It is sufficient if we discuss two cases, one of which upheld the said primary principle while the other, obviously, though not expressly, rejected the application of the said primary principle in criminal cases.

The first of such cases would have to be *Attorney General's Reference (No 2 of 1982)*,[9] where the question posed to the Queen's Bench comprising Watkins and Kerr LJJ, is remarkably similar to the question before us D presently. The question there was:

> Whether a man in total control of a limited liability company (by reason of his shareholding and directorship) is capable of stealing the property of the company; and whether two men in total control of a limited liability company (by reason of their shareholdings and directorships) are, (while acting in concert) E capable of jointly stealing the property of the company.

The accused persons were charged with theft of money from a company totally owned and controlled by them. The learned judge held that they had no case to answer at the end of prosecution case and directed the jury to acquit them. The Attorney General referred the quoted question to the F Queen's Bench.

It is to be borne in mind that theft, under the Theft Act 1968 of Britain is, inter alia, dishonestly appropriating of property of another. 'Dishonest' or 'dishonestly' would appear to bear the common dictionary meaning of intention to cheat or deceive and whereas our Penal Code (FMS Cap 45) G defines 'dishonestly' differently and about which we will deal with later.

In the *Attorney General's Reference*,[9] Kerr LJ, delivering the judgment, disagreed that there was no case to answer at the end of the prosecution case and after reviewing a number of cases, his Lordship relied on a civil case, viz *Belmont Finance Corp Ltd v Williams Furniture Ltd.*[10] In *Belmont*,[10] directors (who were also shareholders) used the company's funds to buy H shares of another company at an excessive price. The receiver appointed sued them for damages for breach of trust and misfeasance. The High Court dismissed the claim but the Court of Appeal reversed the High Court's decision for the reason that since the directors knew it was an illegal transaction, their knowledge could not be imparted to their company which I was a victim of such conspiracy and could not be regarded as a party to the conspiracy. Kerr LJ, inter alia, held that the position should be the same in criminal law and held further that that view was in accord with the view of Professor Glenville Williams's *Text Book of Criminal Law* (2nd Ed).

The other case that went against the decision in *Attorney General's Reference*[9] is *R v Ralph Roffel*,[11] a decision by a majority of two to one in the Court of Criminal Appeal of Victoria, Australia. In that case, the accused was convicted of stealing a cheque, being property to the company of which he and his wife were the sole shareholders and directors. On appeal against conviction, the appeal was allowed by such majority. It was held to be sufficient that the whole transaction was consensual, and consent was foreign to the notion of usurpation which was the element of theft. The majority further disapproved the *Attorney General's Reference*,[9] and approved the concept of a man being the directing mind and will of a company and therefore the embodiment of the company, not just his agent or servant, as propounded by Lord Reid also in *Tesco Supermarkets Ltd v Nattrass*[12] at p 170, a case in which a company was prosecuted, and not a case in which someone was charged for committing an offence against a company. The reliance by the court there on *Tesco Supermarkets*[12] would not appear to us to be suitable.

The passage of Lord Reid in *Tesco Supermarkets*[12] relied on by the majority is set out below:

> I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

We would comment on *Tesco Supermarkets*.[12] At common law, one of the difficulties of prosecuting a company which has to act by necessity through human agency is the absence of a rule similar to the rule of vicarious liability in civil law, for to find a company guilty, mens rea is a necessary element. Modern statutes have made a company stand in the shoes of a master or principal liable for offences committed by servants or agents and have in some cases dispensed totally with the requirement of mens rea against a company or any offender. However, starting prominently with the case of *DPP v Kent and Sussex Contractors Ltd*[13] and other ensuing cases, it has been held, directly or indirectly that a company *can* be held liable for offences 'personally' without the need to prove any agency or relationships of master and servant, even in the absence of any statutory provision for express vicarious liability against a company, where the officer or director of the company can be regarded from evidence as the directing mind or the controlling will of the company so as to become its embodiment.

Tesco Supermarkets[12] brought out this concept clearly. The Supermarkets company had hundreds of shop managers and was charged, not vicariously, for an offence committed by one of its shop managers in failing to ensure the goods advertised for sale at a particular price was in fact sold at the price. Lord Reid, after making the passage cited, went on to hold the board of directors had never delegated their functions to any of these shop managers and therefore the acts of the shop manager in question was not that of the Supermarkets company which, in consequence, was not guilty of the offence under the Trade Description Act 1968 of Britain.

Having regard to the case mentioned, we are of the view that the *Attorney General's Reference*[9] was rightly decided and we disagree with the majority judgment in *Ralph Roffel.*[11] We also approve the dictum of Buckley LJ in *Belmont*[10] which was adopted by Kerr LJ in *Attorney General's Reference.*[9] The consent or knowledge of a sole shareholder and director of even a one-man company can *not* be treated as the knowledge and consent of the company itself when the company is a victim of fraud or of any illegal deprivation of its assets. The concept of a person, eg a director of a company being the company's directing mind cannot apply when the company is such a victim of offences against the company, but only when the company is prosecuted for an offence where the prosecution cannot rely on any statute or statutorily vicarious criminal liability. We are prepared to say without hesitation that the said primary principle applies inviolably in cases in which a company is a victim of fraud or wrongful deprivation and in criminal offences against the property of the company. A simple illustration will make it clear. Supposing a managing director of a public company draws a tremendously large sum of special remuneration for himself so as to clearly amount to cheating the company, and if he is charged, it will be unthinkable for him to set up a defence that he is the company's directing will and controlling mind. We think the said primary principle applies to criminal offences, but this does not enable us to give an answer to the fourth question.

Although the said primary principle of the company being a legal entity applies to criminal cases, we are unable to answer the fourth question with a simple 'negative' or 'affirmative' for the reason that its wording is wide of the mark and is ambiguous. We cannot therefore answer this question as a pure question of law.

To answer the question in the negative would mean that under no circumstances can a director/member of a private limited company be said to have committed an offence under s 409 of the Penal Code (FMS Cap 45) if he pays out money from the said company's funds to a third party where he is the sole contributor of the paid-up capital and the sole beneficial owner of all the issued shares of the said company; we would say that an offence under the said section may be committed depending on the facts of the surrounding circumstances of each particular case.

On the other hand, to answer the question in the affirmative would necessarily mean that such a director or member in terms envisaged by the question would per se commit an offence under the section whether or not there was any dishonest intention.

A We would say that the question as posed can only be answered with reference to the ingredients of an offence such as dishonest intention and so forth. In consideration we decline to answer the fourth question as framed.

We think it would be necessary to deal with the meaning of the words 'criminal breach of trust' as contained in the second charge which is now dealt with. Section 405 of the Penal Code (FMS Cap 45) defines criminal breach of trust as: B

> whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust. C

The mens rea element is contained in the word 'dishonestly' and s 24 defines it as 'whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do the thing dishonestly'. Section 23 defines wrongful loss and wrongful gain thus: D

> Wrongful loss, is the loss by unlawful means of property to which a person losing it is legally entitled. A person is said to gain wrongfully when such person retains wrongfully, as well as such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property. E

One will be immediately struck with the realization that the word 'dishonestly' is not understood in the common parlance or the dictionary meaning of intention to cheat or deceive. It is thus not synonymous with 'fraudulently' used in relation to other sections in the Penal Code (FMS Cap 45), which defines the latter by s 25 as: 'a person said to do a thing fraudulently F if he does that thing with intent to defraud but not otherwise'. The word 'dishonestly' is therefore understood differently in England. Bearing in mind the omnipresence of mens rea (in the absence of its exclusion, express or implied) it is legitimate and in fact it is essential to understand the connection between the word 'intention' used in connection with 'intention G to cause wrongful loss or wrongful gain' *and* mens rea.

The word 'intention' or intentionally or any other similar expression (such as 'with intent') does refer to mens rea which, however, has a wider scope in meaning and generally means the mental element of the offence. Since moral wickedness or turpitude is indicated in many cases, it ought to be borne in mind that such moral turpitude must have been part and parcel H of the definition of the offence in question such as indicated by the use of prescribed words such as 'fraudulently' or 'with intent to deceive'. The word, intention, has acquired a modern meaning which is interwoven with the history of mens rea with which it is desirable to deal very briefly.

It is believed in ancient times, the strict liability of crimes prevailed I before the advent of mens rea. It is believed further that because of the influences of religious law it came to be gradually accepted by the courts that a man should not be punished unless he knew what he did was wrong, actus non reus nisi men sit rea. The moral standard was found at times to be unstable for what was regarded as offensive was not so regarded in another part of the same century, and moral standards do change with the times (the extreme example would be the legalization of homosexuality offence between consenting males in Britain in this century).

Intention, at present, has acquired a special meaning as follows. A man intends to commit the offence or do the forbidden act as prescribed by law, ie described by law, *if* at or before the time of the commission of the offence or the doing of the forbidden act, an accused person has foresight (ie knows in advance) that his conduct will lead to the commission of the offence or the doing of the forbidden act as described or prescribed by law, irrespective of whether he knows it is such an offence or such a forbidden act so described or as prescribed by law *and* he desires the commission of such an offence or doing of such a forbidden act.

We may just as well add, by way of illustration, that where foresight above-described is present, but the desire above-described is absent, then it becomes the mens rea for 'recklessness', such as the offence of causing death by a reckless act. This is not the place or time to discuss further, except that moral wickedness has now practically disappeared from mens rea unless the law prescribes or describes it.

It is with the present legal meaning of intention that we would have to deal with the evidence against the appellants whenever it is necessary to do so.

We now consider the second charge as set out above which was not attended by such controversy as regards the proof of the actual directorship. It was not even disputed by the appellants or on their behalf that they were at the relevant time directors of Holdings Co, the property of which was the subject of criminal breach of trust, and not the property of Lien Hoe.

On the second charge, the evidence against the appellants was that the first appellant had instructed the accountant of Holdings Co to write a cheque for $2,500,751 (the subject matter of the second charge) in order to buy a banker's draft to be made payable to a sharebroking company called Ariffin & Low Securities Sdn Bhd to buy shares in a public listed company called Muda Holdings Bhd. The cheque was signed by both appellants. The accountant was a certified accountant with the academic qualification of 'ACCA'. The payment voucher was prepared for the said cheque for Holdings Co with the words 'advance to payee' and the payee was the first appellant who signed an acknowledgement of receipt and the payment voucher was approved by the second appellant. The said accountant wrote on the reverse of the said payment voucher the words 'Ariffin & Low Securities Sdn' to indicate the application for the banker's draft. The accounts produced showed the said advance and other advances to the first appellant from Holdings Co. All the documents, evidence, cheque, payment voucher and accounts were all prepared long before the police investigation started. All this evidence was apparently accepted by the learned sessions court judge, and the High Court did not accept it as a loan because his Lordship said to the effect that to give a loan there must be money (available) in order to give such a loan, and the sum of $2,500,751 was wrongly gained or acquired by Holdings Co out of the $12m transferred from Lien Hoe.

The first appellant in his defence admitted the loan but said to the effect that the loan was to enable him to gain control ultimately of the public listed company, viz Muda Holdings Bhd when Lien Hoe would be sold at a handsome profit for this purpose.

We have the misfortune of differing from the views of the very able judge and we have to express our disagreement. Since the second charge referred to the commission of breach of trust against the property of Holdings Co and not Lien Hoe, it would not be appropriate to rely on the allegedly illegal origin or source of the money of Holdings Co so as to stamp the money which was drawn out and lent to the first appellant as non-available legally for lending.

It must be observed that the loan or advance in the circumstances of this case as described above was not prohibited by the Act, for example, it was not a loan by Holdings Co to the first appellant to buy shares in Holdings Co itself (eg s 67 of the Act); neither was it a loan to directors as prohibited by s 133 of the Act, Holdings Co being an exempt private company, nor was it prohibited by the memorandum and articles of association of Holdings Co.

Since wrongful loss or wrongful gain, inter alia, is necessarily loss or gain by unlawful means, there is no evidence of unlawfulness about the loan which could render the appellants to prosecution, bearing in mind what has been said just now. Of course the first appellant could be liable to an action by Holdings Co to recover the loan; this, however, in our opinion, is definitely not enough and self-evidently so too, for a borrower cannot be simply said to cause loss to his lender by unlawful means because such borrower can be sued in court. Both the appellants should not have been called for their defence. We therefore think his conviction under the second charge cannot stand also.

Dealing with the third charge, both appellants were charged under the Act and not under the Penal Code (FMS Cap 45) so that the strict proof of directorship required for an offence under the Penal Code (FMS Cap 45) has been modified by the Act's s 4 wherein the definition of director includes a non-director who occupies the position of a director by whatever name called, in order apparently to avoid any evasion of compliance with the provisions of the Act. Such being the case the conviction under the third charge should remain undisturbed. This could be regarded as a curious result by some quarters as both appellants were also charged as directors of Lien Hoe in the third charge as in the first charge, but such result has to be so reached when a court has to give force to any fundamental and important principle of law in the administration of criminal justice explained earlier, where expediency of any kind would have to give way.

We feel we ought to express our view that had the appellants been rightly convicted on the first and second charges, it would be quite legitimate to accept, but only by way of a plea in mitigation of sentence, that the first appellant was the sole beneficial owner of all the shares of Holdings Co and of Lien Hoe by relation, so that no other shareholders in Lien Hoe or

Holdings Co could be wronged and a further plea for a non-custodial sentence (other than a day's imprisonment to satisfy the mandatory requirement of imprisonment) and a fine could be exceptionally and favourably considered.

To summarize, we order that the convictions and sentences on the first and second charges be quashed, and that conviction and sentence on the third charge be confirmed.

Also, we answer the first question in the negative in the context of criminal charges under the Penal Code (FMS Cap 45) and any other law except for statutory offences and requirements created and imposed by the Companies Act 1965 as the case may be. Such being the case, the second and third questions do not arise. We further decline to answer the fourth question for reasons given earlier.

Order accordingly.

Reported by Prof Ahmad Ibrahim